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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

No. [redacted] 36

WALTER N. AHO,
PETITIONER,

v.

CHRISTINA JACOBSEN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

I.
Opinions Below

The opinion of the Court of Appeals for the First Circuit is reported in 249 F 2d 309.

II.
Questions Presented

In an action under the general maritime law to recover for personal injuries received while boarding an inboard fishing vessel docked alongside of a wharf in the Port of Fairhaven, Massachusetts (navigable waters) brought by a crew member of an outboard fishing vessel docked abreast of the said inboard vessel and while enroute to his outboard vessel which was about to sail under circumstances where the said crew member had an implied permission to cross and recross the inboard vessel for access to his outboard vessel created by custom and usage of the fishing industry, the questions presented for determination by this Court are as follows:

I. Whether the analogy of the common law applicable to licensees and business invitees can be properly applied to the general maritime law for determining the duties owed to the petitioner by the inboard vessel owner.

II. Whether the petitioner falls within the category of a licensee or business invitee of the respondent.

III. Whether the Doctrine of unseaworthiness is to be extended to a licensee.

III.
Argument

A. With respect to the first question presented for review, namely, Whether the analogy of the common law applicable to licensees and business invitees can be properly applied to the general maritime law, the general maritime

law is being constantly enriched by common law analogies (See *Jansson* v. *Swedish American Line*, 185 F2d 212, 217 (C.A. 1st 1950)). Also, state wrongful death acts have been applied to the maritime law. See *Western Fuel Co.* v. *Garcia*, 257 U.S. 233, 42 S Ct. 89. Also, see *Spencer Kellogg & Sons, Inc.* v. *Hicks*, 285 U.S. 502, 52 S Ct. 450.

Certainly the maritime law may be enriched by analogies from common law especially where there is no material prejudice to the characteristic features of the general maritime law. The maritime law indeed has already recognized and applied the common law analogy of business-invitee and licensee in maritime situations as the basis of liability.

BUSINESS INVITEE:

Leathers v. *Blessing*, 105 U.S. 626
Hendricksen v. *H. Roberts and Son*, 1947 AMC 1349
The Carnia, 72 Fed. (2) 367, 1935 AMC 111
The Silverado, 31 Fed. (2) 22
Mack v. *U. S.*, 105 Fed. Suppl. 149
The Mystic Terminal Co. v. *Thibeault*, 108 Fed. (2) 813
McCann v. *Anchor Line*, 19 Fed. (2) 338

LICENSEE:

Lauchert v. *American S.S. Co.*, 67 Fed. Supp. 703, 1946 AMC 1381
The Nimbus, 94 Fed. (2) 170, 1938 AMC 132
Apostolou v. *S.S. Eugenia*, 1938 AMC 995
Kermarec v. *Compagnie Generale Transatlantique*, 245 F.2d. 175, 177, (2 Cir., 1957), cert. granted 669 Oct. Term, 1957

B. With respect to the second question, namely, Whether the petitioner falls within the category of a licensee or business invitee of the respondent.

Invitation may be express or implied. In the instant case there is no evidence as to express invitation. To con-

stitute implied invitation, there must be some inducement or allurement on the part of the owner of the premises, or there must be some mutuality of interest to which the visitor's presence relates. In other words, there must be some direct connection between the visitor's presence and the business of the owner of the premises.

Plummer v. *Dill*, 156 Mass. 426
Silva v. *Henry & Close Co.*, 279 Mass. 334
Lauchert v. *American S. S. Co.*, 1946 AMC 1381

The beneficial interest to the owner of the premises must have some direct business or commercial significance.

License is implied when the object of the entry is the convenience or benefit to the one entering the premises with no benefit to the owner of the premises.

The respondent contends that the following two decisions follow the established rule of this Court in following the common law analogies of licensee and business invitee in establishing the duties of the inboard ship owner.

In *Anderson, Adms.* v. *Scully*, 31 Fed. 161, the issue was the liability of a vessel owner to a seaman of an outboard vessel crossing an inboard vessel by a devious route over the deck. The Court spoke of an implied license to cross and approved of the general rule in its only cited decision of *Sweeney* v. *Old Colony R.R. Co.*, 10 Allen (Mass.) 368. There was no reference to an invitation.

In *Anderson* v. *The E. B. Ward, Jr.*, 38 Fed. 44, it is to be noted that the two vessels, inboard and outboard, had changed positions while at the dock. Furthermore the Court made a direct finding that the master of the then inboard vessel had invited the crew of the Marmion to cross. No evidence in relation to the invitation is reported in the decision but it seems reasonable to believe that there must have been some basis for the direct finding of fact.

Examination of *Leathers* v. *Blessing*, 105 U.S. 626, discloses a business invitee status of the plaintiff. And in *The Daylesford*, 30 Fed. 633, the Court stated that the plaintiff custom officer was aboard connected with the cargo which would establish his status as a business-invitee.

The decision of *Lauchert* v. *American S.S. Co.*, 65 Fed. Supp. 703, 1946 AMC 1381 is more in point. Here the plaintiff's ship was moored outside of the defendant's ship. Gangplanks between the two vessels had been rigged by a repair company. Plaintiff while using the gangplank fell and was injured and sued the owner of the inboard vessel for failure to supply access. The Court held that the plaintiff was not an invitee in that he was not on the defendant's premises at the request or invitation of the defendant, nor in connection with any business of the defendant.

The distinction between licensee and invitee is well pointed out in *Hayes* v. *Boston Fish Market Corp.*, 319 Mass. 556 and *Pereira* v. *Gloucester Community Pier Asso., Inc.*, 318 Mass. 391.

The petitioner argues that the positioning by the respondent of her vessel with knowledge of the necessity and the custom and practice of boarding and crossing an inboard vessel for access to an outboard vessel is an inducement on the part of the respondent to use her vessel for such purposes. Even if she had this knowledge which the evidence in the case does not disclose this would not be an inducement but a mere permissive act and permission is not an inducement or an allurement and it is clear that to constitute an implied invitation there must be some mutuality of interest to which the visitor's presence relates.

The petitioner further argues that the respondent has the duty as a business invitee of the wharfinger to the petitioner as a business invitee of the wharfinger since one business invitee owes another business invitee the duty of due care. However, this argument ignores the fact that the

petitioner was not a business invitee as to the respondent but a mere licensee injured upon the respondent's property and that the blocking of the ladder related only to access to the respondent's property.

It is clear from the facts that the petitioner is a mere licensee as to the respondent and cannot at the same time occupy another position in relation to the respondent.

It is also clear from the evidence in the case that the respondent was not guilty of wilful, wanton or reckless misconduct toward the petitioner, nor was there any evidence that the respondent had exposed the petitioner to a hidden peril or failed to use due care after discovering the petitioner to be in danger. There was no evidence that the respondent or her agents or servants were aware that there was a slack rope in the rigging of the "Christina J" and indeed there is no evidence that the respondent was aware the petitioner was going to or did rely on a slack tackle rope.

C. On the third question, namely, whether the doctrine of unseaworthiness is to be extended to a licensee, this Court has so far confined its extension of the doctrine of unseaworthiness to those persons who are performing some duty on the vessel concerned for the benefit of said vessel. It would seem unwise to extend the doctrine to those who go aboard the vessel for their own purposes and for purposes not connected with any benefit to the owner of the vessel. Certainly the duty already exists on the outboard vessel to provide safe access for its own crew members and there is no need to extend the doctrine for the benefit of those crew members to an inboard vessel.

There exist now in the general maritime law the categories of crew members, longshoremen, business invitees, licensees and trespassers or wrong doers. The general maritime law has heretofore considered members of the

crew as wards of the Admiralty Court. The doctrine of unseaworthiness has been extended to cover longshoremen working aboard various vessels. What the petitioner asks here is an elimination of the categories amongst persons who go on ships. It would seem that to eliminate these categories would result in eliminating the theories under which crew members have been protected by the Courts and would make the vessel owner an insurer as to any class of person going aboard his ship. Certainly this would materially prejudice the already established characteristic features of the maritime law.

IV.

Conclusion

Certiorari should not be granted because the Court should not disturb the doctrines already established and since to do so would materially prejudice the characteristic features of the general maritime law.

Respectfully submitted,

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